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No. 77-189 and 77-219

In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER REID WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ARNOLD DEE PLUMLEE SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. 77-219, Ex. I). The opinion of the court of appeals affirming the conviction of petitioners' co-defendants (Pet. App.) is reported at 547 F. 2d 282.

JURISDICTION

The judgment of the court of appeals was entered May 25, 1977. The petition for a writ of certiorari in No. 77-189 was filed on July 22, 1977, and the petition in No. 77-219 was filed on August 8, 1977. Both petitions are therefore substantially out of time under Rule 22(2) of the Rules of this Court. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' scheme to defraud banks violated the federal mail statute, 18 U.S.C. 1341.

STATEMENT

Petitioners and others were charged in an indictment filed in May 1975 in the United States District Court for the Middle District of Florida with conspiracy to commit mail fraud and with multiple counts of the substantive offense, in violation of 18 U.S.C. 371 and 1341. Petitioner Watson pleaded guilty to one substantive count of the indictment and was sentenced to 18 months' imprisonment; petitioner Plumlee pleaded guilty to two substantive counts and was sentenced to three years' imprisonment. In accepting their guilty pleas, the district court acknowledged that both petitioners were preserving their claim that the counts of the indictment did not state an offense and that the district court therefore lacked jurisdiction (Transcript of Rearraignment on February 27, 1976, p. 7); see also *United States* v. *Mirelez*, 496 F. 2d 915 (C.A. 5). The court of appeals affirmed their convictions without opinion (Pet. 77-219, Ex. 1).

Three of petitioners' co-defendants were convicted after a jury trial. Their convictions were affirmed on appeal (Pet. App.). *United States* v. *Johnston*, 547 F. 2d 282 (C.A. 5), certiorari denied, 431 U.S. 942. Petitioner Plumlee testified for the government in the trial.

The conspiracy count of the indictment alleged that the defendants devised a scheme and artifice to defraud certain specified banks and that "[s]aid victim banks were induced by the defendants to accept for deposit worthless instruments in writing, to wit: checks, allowing them to obtain money and property from the victim banks by means of false and fraudulent pretenses * * *." The conspiracy count further alleged that "[i]t was a further part of said conspiracy that the defendants did knowingly cause the victim banks, or their agents, or the drawee banks, to place in the United States mails for delivery by the Postal Service said worthless checks, and did utilize the delay caused by mailing of the worthless checks to further their scheme and artifice to defraud."

Each substantive count of the indictment incorporated the allegations in the conspiracy count and also alleged that in furtherance of the scheme to defraud a specified defendant did cause certain described matter to be delivered by mail. All of the mailings alleged in the substantive counts were either mailings of checks from a depository bank to a drawee bank or mailings of letters from a drawee bank to a depository bank advising that checks sent for collection were not being paid due to insufficient funds.

At the time of petitioners' guilty plea and in order to provide the court with a factual basis for acceptance of that plea, the prosecutor stated that the evidence at trial would show that the petitioners deposited worthless checks in certain victim banks drawn on out-of-state banks, and, utilizing the delay caused by mailings of the checks, returned to the victim banks over a period of several days and withdrew the money before the worthless checks were returned by the drawee banks through the mails. See Transcript of Rearraignment on February 27, 1976, p. 12.

The evidence at the trial of petitioners' co-defendants supported the allegations of the indictment and confirmed the prosecutor's representations. It showed that, in a typical case, one of the defendants would open a checking account in a particular city, usually with small amounts of currency or bona fide checks. After several days, he would then deposit one or more large checks in the account, drawn on accounts in out-of-state banks that contained insufficient funds or no funds to cover the checks. The defendant would incorrectly enter the deposit in the "currency" rather than the "check" portion of the deposit slip. Although all of the victimized banks had a policy under which a depositor was not permitted to withdraw funds deposited by a check for a period of days estimated to be sufficient for the check to be sent for collection and returned, that policy was not followed with respect to the checks alleged in the indictment, either because the teller or the bookkeeping department failed to note that the deposit was by check rather than cash or because the "hold" placed on the deposit by the teller was not transmitted to the bookkeeping department (I Tr. 22, 40-41, 47, 57, 108-109, 131-132, 142, 155-157, 160-161, 186-188; II Tr. 77-78, 80-83, 107).[1]

In the typical case, the defendant, after making the deposit, would call the bank's bookkeeping department after 2:00 p.m.—when all the checks deposited during the day had been posted to customer accounts—to ascertain whether the check he had deposited that day had been credited to his account.[2] If he received an affirmative

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[1]"Tr." refers to the transcript of the trial of petitioners' co-defendants.

[2]This would often be done by posing as a third party asking whether a check he had received from the depositor was good (II Tr. 78, 83).

reply, he would go to the bank the next day or several days later and withdraw all or substantially all of the account in cash, either in one or in several transactions. The evidence disclosed a number of transactions of this kind by all of the defendants, including petitioners (I Tr. 34-35, 134-135, 189-190, 202-203; II Tr. 78, 82-83, 95, 111, 184-195; III Tr. 330).

Officials from the victimized banks testified that the collection process of each bank, by which deposited checks were sent for collection to the drawee bank and either paid or returned unpaid for insufficient funds, employed a combination of private courier services and the United States mail, and that that process typically took six to ten days with respect to out-of-state checks (a period commonly called the "float"). They testified that the defendants' scheme depended for its success on, first, error by the teller or bookkeeper in immediately crediting the defendant's account rather than placing a hold upon it, and, second, withdrawal of the account in cash before the end of the float, at which time the bank would be notified that the deposited check was bad. They also testified that the defendants would not have been permitted immediately to cash the checks when they were presented for deposit (I Tr. 23, 32, 38, 137-139, 142, 198; II Tr. 94; III Tr. 332). There was no testimony, however, that the ability of the defendants to withdraw their accounts in cash depended on the deposited check having *entered* the collection system in general or the mail in particular; rather, that ability depended on the bank's action in erroneously crediting the account.

Petitioners and their co-defendants contended that under *United States* v. *Maze*, 414 U.S. 395, the indictment did not allege, and the evidence did not establish, their use of the mails in furtherance of their scheme and therefore failed to make out a violation of 18 U.S.C. 1341. In *Maze*,

the defendant had stolen a credit card and had used the card to obtain food and lodging at various motels. His indictment under 18 U.S.C. 1341 charged that he had fraudulently obtained goods and services; that he knew that each merchant would send the sales slips through the mails to the collecting bank, which would then mail a bill to the owner of the card for payment; and that the delay resulting from the mailing enabled him to continue purchasing goods and services for an appreciable period of time. 414 U.S. at 397. The evidence at trial supported the allegations in the indictment. This Court held, however, that the evidence did not establish mail fraud in violation of Section 1341 because it did not establish that the mailings were "for the purpose of executing such scheme" to defraud, as the statute requires. The Court reasoned that the fraudulent scheme was complete when the defendant obtained the goods and services and did not depend on the mailings between the merchants, the collecting bank and the owner of the card. The Court also noted that the defendant "probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all." 414 U.S. at 402.

The Court also rejected the government's argument that "essential to the success of any fraudulent credit-card scheme is the 'delay' caused by the use of the mails which aids the perpetrator * * * in the continuation of a fraudulent credit card scheme and the postponement of its detection" (*ibid.*). The Court stated (*id.* at 403):

> But the successful completion of the mailings from the motel owners here to the Louisville bank increased the probability that respondent would be detected and apprehended. There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances. Mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance, and not the mail service, which causes the time lag in the physical transmission of such correspondence.

In affirming the convictions of petitioners' co-defendants, the court of appeals concluded that *Maze* did not require reversal. The court stated (547 F. 2d at 284):

> * * * [T]he Supreme Court has instructed that the mailing must be "for the purpose of executing the scheme". * * * [*Maze, supra,* 414 U.S. at 399]. But the scheme need not necessarily contemplate the use of the mails as an essential element. *Id.* This Court has recently upheld the application of the mail fraud statutes to two check kiting schemes because the success of the schemes depended on the delay involved in the check-clearing process. *United States* v. *Shepherd,* 5 Cir. 1975, 511 F. 2d 119; *United States* v. *Constant,* 5 Cir. 1974, 501 F. 2d 1284, *cert. denied,* 1975, 420 U.S. 910, 95 S.Ct. 830, 42 L.Ed. 2d 840. The dependency on delay distinguished these cases from *Maze,* which involved standard credit card transactions that reached fruition before the mails were ever employed. In the present case, however, the fraud depended on the delay of the check-clearing process. The defendants did not attempt to cash their bogus checks or to withdraw cash coincidently with making the deposits. Instead, they waited until the bank had credited their accounts and then withdrew cash before the checks bounced. By the time the checks were returned through the mails by the payor banks, the defendants had withdrawn the money. The success of the scheme

depended, then, on the delay caused by the use of the mail in the check-clearing process. *Shepherd* and *Constant* indicate that this relation between the scheme and the mail is sufficiently close to justify application of the federal criminal statutes.

DISCUSSION

As this Court reaffirmed in *Maze*, an offense under the mail fraud statute contains two principal elements: first, that the defendant "cause" the use of the mails; and second, that the use of the mails be "for the purpose of executing" the fraudulent scheme—that is, that the mails be used to some degree in furtherance of the scheme.

With respect to the first element, it is well established that the statute does not require that the defendant himself mail certain matter; the statute encompasses use of the mails in furtherance of a fraudulent scheme so long as the defendant "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended * * *." *Pereira* v. *United States*, 347 U.S. 1, 8-9; see also *Maze, supra,* 414 U.S. at 399.

Under those principles, the indictment adequately alleged that petitioners caused the use of the mails, and the evidence at the trial of petitioners' co-defendants amply supported the charge. In view of the typical method of operation of the defendants' scheme and the fact, noted by the court of appeals, that at least some of the defendants were experienced businessmen knowledgeable about banking procedures, it could fairly be concluded that the defendants foresaw that use of the mails would result from their actions.

With respect to the second element, although the mails must be used in furtherance of the fraudulent scheme, "[i]t is not necessary that the scheme contemplate the use of

the mails as an essential element." *Pereira* v. *United States supra,* 347 U.S. at 8; *Maze, supra,* 414 U.S. at 400. The statute proscribes use of the mails so long as that use to some degree furthers the scheme and prevents or delays its detection. Thus, in *United States* v. *Sampson,* 371 U.S. 75, this Court upheld mail fraud convictions where the defendants were charged with having secured advance fees from customers for future services that the defendants never intended to provide, and with having subsequently mailed letters to the customers acknowledging receipt of the fees. The Court held that the subsequent mailings were in furtherance of the scheme because they were designed to lull the victims into a false sense of security and thus, presumably, to defer or avoid complaints to authorities and the ultimate detection of the scheme. See *Maze, supra,* 414 U.S. at 403.[3]

The indictment in this case alleged that the petitioners and their co-defendants "did utilize the delay caused by mailing of the worthless checks to further their scheme and artifice to defraud," and the prosecutor, to provide the court with a factual basis for accepting petitioners'

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[3]Those principles have been generally followed by the courts of appeals. Thus, in *Ohrynowicz* v. *United States,* 542 F. 2d 715 (C.A. 7), the defendant devised a check fraud scheme similar to the one in this case. When he opened his checking account, he filled out an application for personalized checks, which the bank mailed to the check printing company before the defendant withdrew his account, and that mailing formed the basis of one count of the indictment. Although the defendant never intended to use the personalized checks, the court concluded that the application was necessary to provide an appearance of normality and to enable the defendant to obtain the temporary checks that he used to execute his fraud, and that the mailing was a foreseeable concomitant of his action. The court, however, affirmed the district court's dismissal of those counts which alleged the mailings of collection letters between the defrauded banks. See discussion *infra*, p. 14.

guilty pleas (see Fed. R. Crim. P. 11(f)), described a scheme—later proved in the trial of the co-defendants—that was consistent with the charge. The court of appeals concluded that in view of their reliance on the delay factor in the mails, the defendants could be held to have caused the use of the mails in furtherance of their scheme to defraud.

The difficulty with that rationale is that it does not appear to be materially distinguishable from the arguments rejected by this Court in *Maze*, which we read to have held that reliance on the delay caused by the use of the mails does not by itself constitute use of the mails in furtherance of the scheme. As we argued in *Maze* (Gov't. Br. 23-32), the defendant in that case relied on the delay caused by the use of the mails to perpetrate his fraud. Had he not used a credit system with a collection process entailing delay attributable to use of the mails, he might not have been able to obtain goods and services fraudulently. That type of reliance on the mails, however, was not sufficient to bring his actions under the statute.

There are factual differences between this case and *Maze*, but in light of the way the Court dealt with the government's arguments in *Maze*, we cannot conclude that those are differences in principle justifying a different result. The main difference is that petitioners, unlike *Maze*, did not immediately obtain something of value (here cash) upon their presentation of a fraudulent instrument (here, the worthless out-of-state check) and would not have been able to do so; instead, they waited a day or several days before withdrawing the cash. The court of appeals found it significant that the defendant here had to wait one or two days in order to establish an appearance of legitimacy that would enhance their prospects of carrying out their scheme successfully, that they were able to establish that appearance of legitimacy

because of the delay in the collection process, and that they therefore deliberately took advantage of the delay to provide themselves with the appearance of legitimacy necessary to the success of their scheme.

While these differences between the facts of the instant case and those of *Maze* could supply the basis for a different result—rooted in the more substantial and deliberate reliance of these defendants upon the delays caused by the mails—we find ourselves unable to urge this distinction upon the Court unless it is prepared to reevaluate the analysis adopted in the *Maze* opinion. The ability of the petitioners to obtain cash (like the ability of Maze to obtain goods and services) depended in the first instance on the error of the bank (or the merchants in *Maze*) in relying upon their fraudulent representations of creditworthiness. The fact that it may have required a day or two to induce the banks to commit the error of treating petitioners as legitimate depositors, while Maze was able immediately to persuade the merchants that he was legitimate, is a quantitative rather than a qualitative distinction. Consummation of the fraud in either case did not depend upon the subsequent use of the mails; rather, the significance of the mails in each case was to postpone the detection of the defendants' fraud long enough to permit them to obtain something of value.

It was in connection with the government's argument that Maze had capitalized on the delay inherent in use of the mails that this Court observed that Maze "probably would have preferred to have the invoices misplaced * * * and never mailed at all. * * * [T]he successful completion of the mailings * * * increased the probability that respondent would be detected and apprehended." 414 U.S. at 402-403. While petitioners relied to a materially greater extent than Maze on the delay in the mails in executing their scheme, the foregoing language in the

Maze opinion suggests to us that the Court was not prepared to consider reliance on mail delay alone, no matter how substantial, as sufficient to bring a scheme to defraud within the reach of the federal mail fraud statute so long as the mailings themselves do not assist the consummation of the scheme.[4] Accordingly, unless the Court is prepared to reconsider or limit the rationale of *Maze* in a manner that would give effect to the distinction drawn by the court of appeals in the case of petitioners' co-defendants, we are forced to conclude that petitioners' crime did not constitute an offense under 18 U.S.C. 1341.[5]

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[4]See also *Kann* v. *United States*, 323 U.S. 88, where the defendants were charged with having obtained money by fraud; this money was paid to them in the form of checks, which they then cashed. The mailings alleged were mailings of the checks from the cashing bank to the drawee bank for payment. The Court held that this was not mail fraud. "It was immaterial to [the defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." 323 U.S. at 94.

The instant case might well have been different if the indictment alleged, and the proof established, that the petitioners would not have been able to withdraw any money until the deposited checks *entered* the collection system, in which case it could be said that the petitioners used the mails as a place of concealing evidence in order to successfully perpetrate their scheme. See *Kann, supra*, 323 U.S. at 94. The indictment and proof here, however, only alleged and established that the scheme depended in the first instance on bank error; once that error was made, the defendants were able to withdraw cash from the bank whether or not the deposited checks had left the bank's premises and entered the collection system.

[5]It should be noted, however, that schemes of this kind, which appear to have deliberately utilized co-conspirators in different states, pose substantial difficulties to local and state prosecution. Moreover, although the Court was able to note in *Maze, supra*, 414 U.S. at 404-405, that credit card frauds of the kind involved there are now subject to federal prosecution under another statute, it is not clear whether the check fraud involved here would violate any other federal statute. It may be that petitioner's activities constituted bank larceny in

2. It is important for purposes of Section 1341 to distinguish between the one-step check fraud involved in this case and other schemes, commonly referred to as "check-kiting", in which the mails are clearly used in furtherance of the fraud. The most common type of check-kiting scheme appears to involve a series of banks and a series of interrelated deposits that are transmitted in the mails before the scheme reaches fruition. In a typical case, for example, a defendant would deposit a $1000 check in Bank A drawn on Bank B, a $1000 check in Bank B drawn on Bank C, and a $1000 check in Bank C drawn on Bank A, all before the first check, deposited in Bank A, was presented to Bank B for payment. If Bank B erroneously credited that first check before waiting for Bank C to pay the check drawn on it, this would give Bank A the false impression that the account opened there was *bona fide*.[6] The process would then be repeated with ever increasing deposits, and perhaps many times, until a sizeable deposit is built up in one bank that may be withdrawn. In this type of "round robin" scheme (see *United States* v. *Street*, 529 F. 2d 226 (C.A. 6)), the mails play an instrumental role in the ultimate success of the scheme.

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violation of 18 U.S.C. 2113(a) or taking money from a bank "with intent to steal" in violation of 18 U.S.C. 2113(b), cf. *United States* v. *Turley*, 352 U.S. 407; *United States* v. *Fistel*, 460 F. 2d 157 (C.A. 2), but that is far from clear (see *Le Masters* v. *United States*, 378 F. 2d 262 (C.A. 9); *United States* v. *Rogers*, 289 F. 2d 433 (C.A. 4); *Ackerson* v. *United States*, 185 F. 2d 485 (C.A. 8); *United States* v. *Patton*, 120 F. 2d 73 (C.A. 3)).

[6]All check kiting schemes depend on bank error in paying checks before waiting to ascertain whether deposits made in the bank are collectable.

Most of the decisions affirming convictions for check frauds under the mail fraud statute after *Maze*—including those relied on by the court below—involved this kind of scheme. See, *e.g.*, *United States* v. *Street, supra; United States* v. *Shepherd*, 511 F. 2d 119 (C.A. 5); *United States* v. *Constant*, 501 F. 2d 1284 (C.A. 5), certiorari denied, 420 U.S. 910; cf. *United States* v. *Marando*, 504 F. 2d 126, 130 (C.A. 2), certiorari denied *sub nom. Berardelli* v. *United States*, 419 U.S. 1000; but see *United States* v. *Scott*, 554 F. 2d 866 (C.A. 8).

At least one circuit, however, has held that a one-step check fraud, which does not involve a series of mailings of deposited checks between banks, does not constitute mail fraud even though a worthless check is mailed for collection after the defendant cashed it. See *Ohrynowicz* v. *United States*, 542 F. 2d 715 (C.A. 7); *Strauss* v. *United States*, 516 F. 2d 980, 982 (C.A. 7). For the reasons previously discussed, we believe those decisions to be correct applications of the principles set forth in *Maze*. In our view, accordingly, the court of appeals erred in not recognizing the material differences between the schemes involved in the cases on which it relied and the simple scheme alleged in this case.[7]

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[7]If the Court agrees with our submission that this petition should be granted, and the case remanded unless the Court is prepared to reconsider the reasoning in *Maze*, the Court may consider it appropriate to reconsider its denials of the petition for certiorari filed by petitioner's co-defendants. We are aware of only one other case that appears to have involved a one-step check fraud in which this Court denied the defendant's petition for certiorari. *United States* v. *Gardner*, 551 F. 2d 302 (C.A. 2), certiorari denied, 429 U.S. 1104.

CONCLUSION

Unless this Court is prepared to reconsider or limit the reasoning of its decision in *Maze*, the petition for a writ of certiorari should be granted and the case remanded with directions to dismiss the indictment.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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